HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No.685/04 (M/S)

Swami Rameshwar Chetanya

Vs

A.D.J. Dehradun

Approved for reporting

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~~Not Approved for Reporting~~

Date of decision 30/9/04.

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 685 (M/S) Of 2004

Swami Rameshwar Chetanya
R/o 362, Haridwar Marg, Rishikesh
Dehradun.

..... Petitioner

Additional District Judge
F.T.C VI, Dehradun and others.

..... Respondents.

Counsel for the petitioner Sh. M.C. Bansal
Chief Standing Counsel for the respondents.

Dated: 30-9-2004

Hon'ble Rajesh Tandon J.

Heard Sri M.C. Bansal learned counsel for the petitioner and Standing Counsel for the respondents.

By the present writ petition the petitioner has prayed for quashing the order dt. 1-7-2004 by which the application 244 Ga/2 dt. 31-5-2004 has been rejected.

Briefly stated the plaintiff has filed a civil suit no. 83 of 2001 in the Court of Civil Judge (Senior Division) Dehradun for declaration as well as for permanent injunction regarding the property described in schedule A and B in the plaint. Further prayer has been made for declaration that the decree dt. 27-5-2000, passed by the Additional Civil Judge, (Senior Division) Dehradun in Original Suit No. 38/1998 is null and void.

The plaintiff has filed and application that before the statement of the plaintiff his witness Sh. Mahendra Kumar Garg may be examined orally.

253 Ga is the objection filed by the defendant. The defendant has stated that order XVIII Rule 4 of the Code of Civil Procedure only provides for filing the affidavit and no oral examination is permitted.

Issues have already been framed in the suit and the plaintiff has filed a list of witnesses. On 31-5-2004 the plaintiff has moved an application paper No.244 Ga/2 with a prayer that the witness Mahendra Kumar Garg be permitted to be examined orally in the court instead of his affidavit.

On 1-7-2004 the Trial Court has permitted the witness Mahendra Kumar Garg for examination on oath. Present writ petition has been filed challenging the said order.

Counsel for the petitioner has submitted that order XVIII Rule 4 as substituted by the Code of Civil Procedure (Amendment Act 2000) provides as under:-

Order XVIII Rule 4. Recording of evidence

(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

Provided that where documents are fled and the parties rely upon the documents, the proof and admissibility of such documents which are filed alongwith affidavit shall be subject to the orders of the court.

(2) The evidence (Cross-Examination and re-examination) of the witness in attendance, whose

evidence (examination-in-chief) by affidavit has been furnished to the court shall be taken either by the Court or by the commissioner appointed by it;

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit.

Order XVIII Rule 5 provides the manner of receiving evidence in appealable cases. It reads as under:-

"How evidence shall be taken in appealable cases: - In which an appeal is allowed, the evidence of each witness shall be

(a) taken down in the languages of the Court

(i) in writing by, or in the presence and under the personal direction and superintendence of the judge, or

(ii) from the dictation of the judge directly on a typewriter, or

(iii) if the judge, for reasons to be recoded, so directs, recorded mechanically in the language of the Court in the presence of the judge.

A perusal or order XVIII Rule 5 provides that in appealable cases the evidence of each witnesses shall be in writing and shall be in the presence and under the direction and superintendence of the judge.

Counsel for the petitioner has submitted that in view of the substituted order XVIII Rule 4 C.P.C, the examination-in-chief of the witnesses shall be on affidavit.

Counsel for the petitioner has referred the judgment of Apex Court in Ameer Trading Corporation Ltd. Vs. Shpoorji Date processing Ltd. 2004 Vol. 1, AWC page 673. It has been held by the Apex Court as under:-

" Rule 5 refers to the Evidence which is required to be taken in case where the appeal is allowed in contradistinction with the cases where appeal is not allowed as envisaged in Rule 13 of order 18 of the C.P.C. Rule 5, therefore, envisages a situation where the court is required to take down an evidence in the manner laid down therein which would mean that where cross-examination or examination of the witness is to take place in the court."

The examination of a witness would include evidence in chief, cross-examination or re-examination. Rule 4 of Order XVIII speaks of examination-in-chief the unamended Rule provided the manner in which 'evidence' is to be taken. Such examination-in-chief of a witness in every case shall be on affidavit."

" The aforementioned provision has been made to curtail the time taken by the Court in examining a witness-in-chief Sub Rule (2) of Rule 4 of Order XVIII of C.P.C. provides for cross-examination and re-examination of a witness which shall be taken by the Court or the Commissioner appointed by it."

" We may notice that Rule 4 of Order 18 was amended with effect from 1-7-2002 specifically provided thereunder that

the examination-in-chief in every cases shall be on affidavit. Rule 5 of Order XVIII had been incorporated even prior to the said amendment.

Rule 4 of Order XVIII does not make any distinction between an appealable and non-appealable case so far mode of recording evidence is concerned. Such a difference is to be found only in Rule-5 and 13 of Order 18 of the Code of Civil Procedure."

Counsel for the respondent has referred the judgment of Apex Court in Salem Advocate Bar Association, Tamil nadu Vs. Union of India with Bar Association, Balala and others 2002(6) AIR SCW page 4627, Their lordship have held as under: -

" In order 18, Rule 4 has been substituted and sub-rule (1) provides that in every case examination-in-chief of the witnesses shall be on affidavits and copies thereof shall be supplied to the opposite parties by the party who calls them for evidence. It was contended by Mr. Vaidyanathan that it may not be possible for the party calling the witness to compel the witness to file and affidavit. It often happens that the witness may not be under the control of the party who wants to rely upon his evidence and that witness may have to be summoned through Court. Order 16 Rule 1 provides for list of witness being filed and summons being issued to them for being present in the court of recording their evidence. Rule 1-A, on the other hand, refers to production of witnesses without summons where any party to the suit may bring any witness to give any evidence or to produce documents. Reading the provisions of order XVIII together, it appears to us that order

18 Rule 4(1) will necessarily apply to a case contemplated by Order under Rule 1 bring any witness to give evidence or produce any documents, in such case, examination-in-chief is not to be recorded in Court but shall be in the form of an affidavit."

" In cases where the summons have to be issued under Order 16,Rule 1 , the stringent provision of Order 18 Rule 4 may not apply. When summons are issued, the Court can give an option to the witness summoned either to file an affidavit by way of examination-in-chief or to be present in Court for his examination. In appropriate cases, the Court can direct the summoned witness to file an affidavit by way of examination-in-chief. In other words, with regard to the summoned witnesses the principle incorporated in Order 18, Rule 4 can be waived. Whether a witness shall be directed to file affidavit or be required to be present in Court for recording of his evidence is a matter to be decided by the Court in its discretion having regard to the facts of each case."

In cases where the summons have to be issued under order 16 Rule 1 the stringent provision of Order 18, Rule 4 may not apply. When summons are issued, the Court can given an option to the witness summoned either to file an affidavit by way of examination-in-chief or to be present in Court for his examination. In appropriate cases, the Court can direct to summon the witness to file an affidavit by way of examination-in-chief. In order words, with regard to the summoned witnesses the principle of filing of the affidavit or required to be present in Court for recording of his evidence is a matter to be decided by the Court in its discretion having to the facts of each case.

In the aforesaid Salem Advocate Bar Association (Supra) the Apex Court has pointed out that order XVIII rule 4 will apply to the cases of order XVI Rule (1) (A) whereas order XVI, Rule 1 provides that the list of witnesses shall be submitted on receiving summons. Both order XVI, Rule 1 as well Rule (1)(A) are quoted below:-

Order XVI Rule 1. List of witnesses and summons to witnesses-1

" On the before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom them propose to call either to give evidence or to produce documents and obtain summons to such persons for their attendance in Court."

1A. Production of Witnesses without summons:-

Subject to provisions of sub-rule (3) of Rule 1, any party to the suit may, without applying for summons under Rule 1, bring any witness to give evidence or to produce documents."

In the present case summons have been issued under order XVI Rule 1 and therefore in accordance with the case of Salem Advocate Bar Association (Supra) the stringent provision of Order XVIII Rule 4 shall not apply. When summons are issued and the Court has been give an option either for summing the witnesses or to file an affidavit by way of examination-in-chief or to be present in the Court for his

examination. Therefore, distinction between Order XVI rule 1 and Rule 1A, being apparent. The discretion exercised by the Court below, therefore, while permitting the examination-in-chief orally in place of affidavit, does not require any interference under Article 226/227 of the Constitution of India.

So far as the language of Order 18 Rule 4 of the Code of Civil Procedure with regard to the recording of evidence is concerned, the same needs no further interpretation as admittedly, the summons were issued under Order 16 Rule 1 and as such the stringent provision of order 18 Rule 4 shall not apply.

The need of society is that there should be justice-oriented approach and the appeal should not be rejected only on the ground of technicalities. The Apex Court has held in M.S. Grewal vs. Deep Chand Sood (2001) 8 SCC 151, as under:

" Law Courts will lose their efficicacy if they cannot possibly respond to the need of the society- technicalities there might be many but the justice-oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice."

In Surya Dev Rai Vs. Ram Chander SCC 2003 Vol-6 675, the Apex Court has held as under: -

" Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts

within the bounds of their jurisdiction. When a subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction."

" Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirement are satisfied: (i) The error is manifest and apparent on the fact of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby."

" A patent error is an error which is self-evident i.e which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent."

" The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or correction is yet capable of being corrected at the conclusion of the proceedings is any appeal or revision preferred thereagainst and entertaining a petition invoking

certiorari or supervisory jurisdiction of the High court would obstruct the smooth flow and or early disposal of the suit of proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that every moment, may become incapable of correction at a letter stage and refused to intervene would result in starvesty of justice or where such refusal itself would result in prolonging of the lis."

" The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character."

Relying upon the Judgment of Surya Dev Rai Vs. Ram Chandra 2003 (6) SCC 675, the Apex Court in Ranjeet Singh Vs. Ravi Prakash 2004 (3) SCC 682, has held as under: -

" As to the exercise of supervisory jurisdiction of the High Court under Article 227 of the Constitution of India also, it has been held in Surya Dev Rai that the jurisdiction was not available to be exercised for indulging in reappreciation or evaluation of evidence or correcting the errors in drawing inferences like a court of appeal."

In view of the aforesaid, I find no illegality in the order passed by the Learned Additional District Judge/F.T.C. VIII, Dehradun. The writ petition is dismissed. There will be no order as to costs. The stay order is discharged.

However, the suit itself is directed to be decided within a period of 3months from the filing of the certified copy of the order.

Dated:-30-9-2004 **(RAJESH TANDON J.)**
M.K.